United States Court of Appeals

for the Second Circuit

REPLY BRIEF

sent to WF WHM

74-1874 FvPBryan

State of Connecticut

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March 12, 1975

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Honorable Wilfred Feinberg
Honorable William Hughes Mulligan
Honorable Frederick van Pelt Bryan
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Susan Roe v. Norton
No. 74-1874

Dear Judges Feinberg, Mulligan and Bryan:

The Court has advised the defendant-commissioner that he may file a reply to the amicus Memorandum of Law submitted by HEW, and the appellees' Brief in Reply thereto by March 14, 1975. The Court has further advised that it will be permissible to make this reply in letter form. The reply of the defendant-commissioner follows:

STATEMENT

It is the position of HEW as stated in its amicus brief that under the Title XIX Medicaid program, a State under its state plan is neither compelled to pay for an abortion which has not been certified as "medically necessary" by the Medicaid recipient's own physician, nor is it precluded, under the program, from paying

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for such a non-medically necessary abortion.

Contrary to the harsh appraisal placed upon it by the appellees, the defendant-commissioner has found the amicus brief of HEW to be of great help in clarifying several of the complexities of the Medicaid program. Nonetheless, we cannot agree with the conclusion of HEW for reasons that are discussed infra that Congress has given that Agency, under the Title XIX Medicaid program, the "option" to provide to a State, federal reimbursement for an abortion (or for that matter any other medical service) which is not certified, either explicitly or implicitly, by the attending physician as a "necessary medical service." The defendant-commissioner believes that Congress has required under the Act that all medical assistance given thereunder must be medically necessary.[1]

DISCUSSION

I.

We are indebted to HEW for shedding light in particular on the provision contained in § 1396d(a)(6). If this language were taken literally it would appear that the Title XIX program imposes virtually no limitation whatever on the "medical care, or any other type of remedial care recognized by State law, furnished by licensed practitioners within the scope of their practice as defined by State law."

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[1]We agree with HEW, however, that in certain specified instances, which are discussed infra, HEW under the power delegated to it by Congress, would be justified in treating certain preventive health services, as entitled to coverage under the Act, notably in the case of the mandatory early and periodic screening, diagnosis and treatment program (EPSDT) for Medicaid-eligible children under 21 years of age pursuant to 42 U.S.C. § 1396d. The "screening" aspect of this program would not ordinarily be regarded as "medically necessary."

HEW has explained in its amicus brief, however, in commenting upon the above-quoted portion of the Act (at p.4, n.2) that:

> "While the scope of title XIX coverage is broad, it is more limited than it may perhaps appear. . . . [T]he purpose of this provision is to permit the states, if they so choose, to pay the costs of medical services performed by certain licensed practitioners, such as chiropractors, who are not physicians. Thus that provision may not be read as requring the states to pay for all medical services, whether or not necessary."

Appellants regard this interpretation which HEW has placed upon this subsection [1396d(a)(6)] as of particular significance in clarifying the meaning of the Act and in defining the scope of the program. Taken at face value, the language of that subsection might appear, as HEW has noted, to define the "medical assistance" which could be rendered under the Medicaid program as virtually unlimited. In reality however, as HEW has explained, "[t]he purpose of this provision is to permit the states, if they so choose, to pay the costs of medical services performed by certain licensed practitioners, such as chiropractors, who are not physicians. Thus that provision may not be read as requiring the states to pay for all medical services, whether or not necessary." [Memorandum For The United States As Amicus Curiae, p.4., n.2].

It may well be that the district court, without the benefit of this HEW interpretation, and at the urging of appellees may have misconstrued this provision in arriving at its decision. A portion of the language of the district court's opinion lends some support to this view:

> "However, when a patient's condition does require some medical attention, the choice of service to be rendered should normally be a matter between doctor and patient, so long as it is an accepted medical procedure, and does not involve costs that are excessive compared to adequate alternatives."
> [Memorandum of Decision, A-46]

The logical import of this conclusion by the district court would, of course, mean that under the Title XIX program not only would there be no requirement of medical necessity for services provided, but that there would be almost no limitation on the program.

HEW has called attention, in its amicus brief to the fact that the Title XIX Medicaid program is narrower in its scope that might appear from an initial reading of its extensive provisions, and that "the States have considerable discretion in forming the content of their Medicaid programs." [amicus brief, p.4]

HEW has pointed out that under 42 USC 1396d(a) a state need not include under its Medicaid program all of the categories described in that section. In order to qualify for federal reimbursement however, it must provide all of the services contained in subsections (1) through (5).[2] These services are:

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

(2) outpatient hospital services;

(3) other laboratory and X-ray services;

(4) (A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 29 years of age or older (b) effective July 1, j1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under

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[2]In the case of individuals covered by the Medicaid program, who are not on any public assistance program, the State may provide, instead of items (1) through (5), any seven (7) of the clauses numbered (1) through (16). 42 USC 1396a(13)(C)(ii).